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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re J.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.C., Defendant and Appellant.	A137285 (Contra Costa County Super. Ct. No. J1201426)

I.

INTRODUCTION

J.C., a minor (appellant), appeals after the juvenile court sustained the allegations of a juvenile wardship petition (Welf. & Inst. Code, § 602)[1] alleging that he possessed a concealed weapon (Pen. Code, § 29610). At the dispositional hearing, the juvenile court committed appellant to a six-month program at the Orin Allen Youth Rehabilitation Facility (OAYRF), followed by a 90-day conditional parole period, and imposed various terms and conditions.

In this appeal, appellant contends (1) the juvenile court erred in denying him deferred entry of judgment (DEJ); (2) the juvenile court compromised the fairness of the proceeding when it read the report prepared for the DEJ hearing prior to presiding over

[1] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

the jurisdictional hearing; and (3) if the previous argument was forfeited by defense counsel's failure to object, appellant was deprived of effective assistance of counsel. Appellant also claims certain probation conditions should be modified and maximum commitment time and credits should be recomputed. We find appellant's last contention has merit. In all other respects, we affirm the judgment.

II.

FACTS AND PROCEDURAL HISTORY

At about 12:05 a.m. on October 7, 2012, an El Cerrito police officer stopped a pickup truck for a traffic violation. The vehicle contained a teenage driver and three juvenile passengers. Appellant, who was 15 years old, was sitting in the front passenger seat. The officer looked into the vehicle. He saw a silver firearm magazine clip protruding from under appellant's seat. The officer removed the magazine clip from under appellant's seat and determined that it was loaded with several rounds of .40-caliber Smith & Wesson bullets, four of which were hollow-point rounds.

Behind the magazine clip under appellant's seat, the officer found an unloaded .40-caliber, semi-automatic, black Smith & Wesson handgun. The gun's barrel was about six inches long. The gun and magazine clip were "within arms reach" of appellant. Neither the gun nor magazine clip was within reach of the rear passenger.

Upon arrival at the police department, appellant was searched by an officer who found ammunition in appellant's pocket. The ammunition matched that found in the magazine of the firearm. A search of appellant's cell phone contained photos where appellant was making hand gestures that appeared to be gang signs.[2] Appellant's cell phone also contained a photo of a hand holding a gun similar to the gun found under his seat in the truck.

The boy who was sitting behind appellant in the truck also had a photograph on his cell phone showing that boy holding a handgun similar to the gun found under

[2] At the jurisdiction hearing, when the officer testified that appellant's cell phone contained photographs of him "holding up signs with his hands, possibly gang related," the court ordered the "possibly gang related" phrase stricken as "speculative."

appellant's seat. Defense counsel argued the evidence indicated the gun belonged to the boy seated behind appellant in the truck.

After considering the evidence and counsels' arguments, the court found count 1 (possession of a concealed firearm) to be true. The court dismissed count 2 (possession of a loaded concealable firearm in a vehicle) and count 3 (possession of live ammunition by a minor) for insufficiency of the evidence.

At the dispositional hearing held on November 28, 2012, the court adjudged appellant to be a ward of the court and committed him to OAYRF for a six-month program with an additional 90-day conditional release/parole period. On December 4, 2012, appellant filed a notice of appeal.

A. The Juvenile Court's Exercise of Discretion to Deny DEJ

Appellant contends the juvenile court abused its discretion in concluding he was not suitable for DEJ. The DEJ provisions, found at sections 790 et seq., were enacted in March 2000 as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998. (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558 (*Martha C*).) "The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. [Citations.]" (*Ibid*.)

A minor is eligible for DEJ if all of the following circumstances apply: "(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense. [¶] (2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707. [¶] (3) The minor has not previously been committed to the custody of the Youth Authority. [¶] (4) The minor's record does not indicate that probation has ever been revoked without being completed. [¶] (5) The minor is at least

14 years of age at the time of the hearing. [¶] (6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code." (§ 790, subd. (a)(1)-(6).)

Here, there is no dispute that appellant was eligible for DEJ. However, just because a minor meets the statutory criteria for DEJ eligibility does not mean the minor is automatically entitled to DEJ. Once eligibility is established, the court must make an independent determination of the minor's suitability for DEJ. In other words, "the statutory language empowers but does not compel the juvenile court to grant" DEJ. (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 605 (*Sergio R.*).) The court exercises its discretion based upon whether the minor will derive benefit from education, treatment, and rehabilitation rather than a more restrictive commitment. (*Id*. at p. 607.) The suitability factors include the minor's "age, maturity, educational background, family relationships, motivation, any treatment history, and any other relevant factors regarding the benefit the child would derive from education, treatment, and rehabilitation efforts . . . ." (Cal. Rules of Court, rule 5.800(d)(3)(A)(i); see also *Sergio R.*, *supra*, 106 Cal.App.4th at p. 607, fn. 9.) A court may conclude that the circumstances of a crime indicate that a minor is not amenable to rehabilitation. (*Martha C.*, *supra*, 108 Cal.App.4th at p. 562; see, e.g., *In re Damian M.* (2010) 185 Cal.App.4th 1, 6 [upholding denial of DEJ when minor was engaged in "sophisticated criminal conduct"].)

In the instant case, pursuant to the juvenile court's order, the probation department screened appellant to assess his suitability for DEJ and issued a report entitled "Suitability Report and Recommendation for [DEJ]." The report concluded that although appellant "appears to meet the eligibility requirements for [DEJ]," the following factors established that he was "not a suitable candidate for [DEJ]": (1) his poor academic performance; (2) his report to juvenile hall staff on intake that he was an associate of the "Swerve Team" street gang; (3) his school records reflecting numerous discipline incidents for fighting, assaulting, and bullying other students; (4) a school incident where appellant helped "tie another student's hands with a sweater, after which he and another student kicked the student whose hands were tied;" and (5) being caught in a vehicle with a firearm and loaded magazine.

After a contested hearing, the court followed the probation department's recommendation and found appellant was not a suitable candidate for DEJ. The court's oral pronouncement stated, in part: "This is not a situation where I think that the services of [DEJ] would benefit the minor. I think he needs something more intensive. And I'm mindful that he's 15 and I'm mindful this is an original . . . petition. I don't know if we'll get to disposition at this point, he hasn't admitted to anything and we have a contest set. [¶] But there are multiple areas in this report that concern the Court regarding his gang association, his possession of a firearm." The court concluded its remarks by noting, "[Appellant] is young and I'm assuming with the appropriate level of intervention he will be able to turn this around, but there are way too many areas where he needs work on . . . . [¶] So [the] DEJ request, while he is technically eligible, is denied."

Appellant claims the court erred in finding him unsuitable for DEJ because, in doing so, the court "improperly disregard[ed] its own finding that appellant was amenable to and would benefit from treatment and rehabilitation." He argues that, "[a]s a first-time, youthful, non-violent offender who was motivated toward rehabilitation, appellant was precisely the type of person for whom the DEJ program was intended, and he should have been given an opportunity to demonstrate his ability to comply with the conditions."

The decision of the juvenile court finding a minor unsuitable for DEJ may be reversed on appeal only upon a showing that the court abused its discretion in making the disposition. (See *In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330; see *Sergio R., supra,* 106 Cal.App.4th at p. 607.) An abuse of discretion occurs only when the trial court " 'exceeds the bounds of reason, all of the circumstances before it being considered.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 (*Denham*).)

In claiming the court abused it discretion when it found appellant unsuitable for DEJ, the minor places great reliance on excerpted language found in the case of *Martha C., supra,* 108 Cal.App.4th 556. In that case, the minor admitted the allegations of the petition that she possessed marijuana for sale and that she transported marijuana. (*Id.* at p. 559.) Although her probation officer believed she was a suitable candidate for

DEJ, the trial court disagreed, stating that it wished to deter other minors who might engage in sophisticated drug-smuggling schemes. (*Id.* at pp. 559-560.)

On appeal, the *Martha C.* court granted the petition for writ of mandate and ordered the trial court to reconsider DEJ because the court had not properly evaluated the statutory criteria—i.e., whether the minor was amenable to education, treatment, or rehabilitation. The court explained: "In this case, the probation department concluded Martha would benefit from education, treatment and rehabilitation. The trial court's remarks suggest it agreed. The court, however, denied DEJ because it wished to send a message to other potential juvenile drug smugglers that there would be permanent consequences flowing from such criminal activity. This was not an appropriate basis for denying DEJ since it had nothing to do with Martha's potential for rehabilitation. While a court might find that the circumstances of a crime indicate a minor is not amenable to rehabilitation [citation], and on that basis deny DEJ, it may not do so as a means of deterring criminal activity by others." (*Martha C.*, *supra*, 108 Cal.App.4th at p. 562.)

Appellant points to certain language in *Martha C.* which he claims reflects the view that DEJ *must* be granted once the juvenile court finds the minor is amenable to education, treatment and rehabilitation. For example, the court in *Martha C.* proclaims, "[w]hile section 790 et seq. might be clearer on the matter, we conclude such denial [of DEJ] is proper only when the trial court finds the minor would not benefit from education, treatment and rehabilitation." (*Martha C.*, *supra,* 108 Cal.App.4th at p. 561.) In another passage, the *Martha C.* court indicates: "These findings [from the language of Proposition 21] express not only a strong preference for rehabilitation of first-time nonviolent juvenile offenders but suggest that under appropriate circumstances DEJ is required." (*Ibid.*)

But other statements in the opinion acknowledge the discretionary nature of such a determination by the juvenile court: "To be admitted to the DEJ program, a minor must be eligible under section 790, subdivision (a). While such eligibility is a necessary condition for DEJ, it is not alone a sufficient basis. Under proper circumstances the court may refuse DEJ even to minors eligible under section 790, subdivision (a). [Citation.]"

(*Martha C.*, *supra*, 108 Cal.App.4th at p. 560.) Consequently, we hesitate to read *Martha C.* as broadly as appellant urges. Rather, we read it in the context of its overall finding that the juvenile court abused its discretion in ignoring compelling personal characteristics of the juvenile defendant; and instead, basing its decision to deny DEJ on a desire to "send a message to other potential juvenile drug smugglers that there would be permanent consequences flowing from such criminal activity." (*Id.* at p. 562.)

In contrast to *Martha C.*, there is nothing in this case to indicate the juvenile court failed to give full consideration to appellant's individual characteristics and suitability for DEJ. Furthermore, the court did not abuse its discretion when it followed the probation officer's recommendation and found appellant was not suitable for DEJ, based on the entirety of the record which demonstrated: (1) appellant's deteriorating school performance, (2) his acts of bullying fellow students, (3) his inability to refrain from criminal behavior even though he had voluntarily engaged in counseling prior to the incident, and (4) his involvement with gang activity. In light of the foregoing, the juvenile court reasonably denied DEJ based on its belief that appellant would receive greater benefit from more extensive services. In the court's own words, "I don't think at this juncture that he is a good candidate for [DEJ]. I believe he has too many areas that he needs to improve upon and I think that the rehabilitative program or services through [DEJ] pale in comparison to what he would have if he were actually adjudged a formal ward of the Court."

We find the trial court appropriately exercised its discretion to deny DEJ because the DEJ program did not offer the intensive supervision appellant needed. Although challenged by appellant on appeal, this was a proper reason to deny DEJ. For example, in *Sergio R.*, the court upheld denial of DEJ because the circumstances of the offense showed that the minor was an entrenched gang member who "required more formal, restrictive measures." (*Sergio R.*, *supra*, 106 Cal.App.4th at p. 608.)

Appellant also challenges the juvenile court's assumption that appellant needed to be declared a ward of the court in order to receive more intensive services. He points out "[t]he court did not identify the nature of the services provided by each program, and

which services—not available to DEJ program participants—were required for appellant's rehabilitation." Appellant opines that the probation department could have provided the necessary services to appellant even if he was referred to the DEJ. However, these arguments are speculative and fail to afford appropriate deference to the juvenile court's findings, especially considering appellant made no request for greater specificity. While nothing in the record details exactly what services DEJ can or cannot provide, we must presume the juvenile court was familiar with the available services offered by DEJ, and could accurately gauge the spectrum of various service options offered by all the dispositional alternatives. As an implied finding of fact, this determination of the juvenile court is given deference on appeal, especially in the absence of any contrary evidence. (See *Denham, supra,* 2 Cal.3d at p. 564.)

B. Court's Consideration of Material in the DEJ Report

Appellant maintains that the record shows the trial judge considered "prejudicial and inadmissible information" contained in the DEJ report, "incriminating appellant in the alleged offense and insinuating that he associated with gang members" before she made the jurisdictional finding that he possessed a concealed weapon. Appellant points to excerpts from the DEJ report which state that appellant "initially denied possessing the firearm; however, he then indicated he was in possession of the firearm, but stated he borrowed it." The report also notes that one of the other juveniles in the truck with appellant said that appellant owned the firearm found in the vehicle. Appellant later said that he and his friends were on their way to a party and he forgot the firearm was in the truck. Appellant also acknowledged associating with the "Swerve Team" street gang. Appellant claims he was deprived of his right to due process because "Judge Hinton became aware of information relating to guilt, through the DEJ report and DEJ hearing, that was not part of the evidence against appellant at the jurisdictional hearing."

It has long been the rule that a juvenile court may not read or consider any portion of a probation report until *after* it makes its jurisdictional findings.[3] (See *In re Gladys R.* (1970) 1 Cal.3d 855, 860 (*Gladys R.*); Cal. Rules of Court, rule 5.780(c).) The purpose of this rule "is to prevent the making of jurisdictional findings based on irrelevant negative information contained in the probation report. [Citation.]" (*In re Christopher S.* (1992) 10 Cal.App.4th 1337, 1345 (*Christopher S.*).)

However, appellant failed to object to the court's conducting the jurisdictional hearing based on the improper consideration of the information in the DEJ report. There is a split of authority as to whether appellant forfeited any claim of error by failing to object in the trial court. (Compare *Gladys R.*, *supra*, 1 Cal.3d at pp. 861-862 [failure to object to premature consideration of social study did not waive issue on appeal]; *In re D.J.B.* (1971) 18 Cal.App.3d 782, 784-785 (*D.J.B.*) [following *Gladys R.*, holding that the "review by the juvenile court of a probation report or social study prior to or during the jurisdictional hearing constitutes prejudicial error even though no objection is made at the juvenile court hearing to the court's premature use of such report or social study"]; with *Christopher S.*, *supra*, 10 Cal.App.4th at pp. 1344-1345 [court erred in prematurely reading probation report, but error waived by failing to object].)

We conclude the better reasoned view is that the error must be raised to the juvenile court or the issue is forfeited on appeal. (*Christopher S.*, *supra*, 10 Cal.App.4th at p. 1345.) We agree with *Christopher S.* that the holding in *Gladys R.* was based on circumstances wholly inapplicable to subsequent cases, including this one. (See *Christopher S.*, *supra*, 10 Cal.App.4th at pp. 1344-1345.) In *Gladys R.*, the sole reason for excusing the minor's failure to object was that the law regarding what constituted admissible evidence at an adjudicatory hearing had recently changed. The Supreme Court found that it would have been unfair to expect the minor's attorney to "anticipate that an appellate court will later interpret the controlling sections in a manner contrary to

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[3] Appellant claims "the probation officer's DEJ suitability report is analogous to a dispositional report, prior review of which is prohibited . . . ." Respondent does not dispute this proposition on appeal.

the apparently prevalent contemporaneous interpretation." (*Gladys R., supra*, 1 Cal.3d at p. 861; *Christopher S., supra*, 10 Cal.App.4th at pp. 1344-1345.) However, *D.J.B.* extrapolated the fact-specific holding of *Gladys R.*, excusing the failure to object on equitable grounds, to support an excusal in every action where no objection was interposed to the juvenile court's premature consideration of a probation report. (*D.J.B., supra*, 18 Cal.App.3d at pp. 784-785.)

Appellant offers no persuasive reason why the normal forfeiture rule should not apply. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1207 [finding a waiver where the party failed to raise an objection seeking a judge's disqualification at the first opportunity]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1111, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151 [same]; *In re Steven O*. (1991) 229 Cal.App.3d 46, 54 [same].) Accordingly, by failing to timely object, appellant has forfeited his contention that the trial court deprived him of due process by conducting the adjudicatory hearing after considering prejudicial information in the DEJ report. (*Christopher S., supra*, 10 Cal.App.4th at p. 1345.)

C. Ineffective Assistance of Counsel for Failure to Object

Appellant alternatively contends his trial counsel was ineffective "for failing to object to Judge Hinton presiding over the contested jurisdictional hearing after she had reviewed prejudicial and inadmissible information incriminating appellant in the alleged offense and insinuating that he associated with gang members . . . ." Appellant claims "[h]ad a different judge heard the matter, it is reasonably probable that the firearm charge would not have been sustained because the evidence introduced at the jurisdictional hearing was circumstantial and pointed to another minor as being the owner of the gun."

To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." (*Id.* at p. 694; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668.)

We first point out that the proper way to raise this type of claim is by petition for writ of habeas corpus, not appeal, because a trial counsel's acts or omissions are typically motivated by considerations not reflected in the record. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 463.) Here, the record sheds no light on why appellant's counsel failed to pursue disqualification procedures. When " ' "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged," ' " the claim cannot be considered on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) The only exceptions are when " ' "counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." . . .' [Citations.]" (*Ibid.*) This is not such a case. We must, to the contrary, "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

Additionally, without a showing of some type of prejudice, defense counsel's failure to move for disqualification cannot be the basis of a valid claim for ineffective assistance of counsel. In a nonjury trial, where the judge is tasked with the responsibility of ruling on the admissibility of evidence, there is a strong presumption that the judge disregarded inadmissible evidence and decided the matter from a consideration of the relevant and admissible evidence. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 151-152 [a reviewing court assumes the court was not improperly influenced by inadmissible material, absent evidence in the record to the contrary]; *People v. Coddington* (2000) 23 Cal.4th 529, 644-645 [while trial court erroneously read probation report before ruling on automatic application for modification of death verdict, "[a]bsent evidence to the contrary the court will assume that the judge was not influenced by the material"]; *People v. Farnam* (2002) 28 Cal.4th 107, 196 [same]; see also *In re James B.* (2003) 109 Cal.App.4th 862, 874-875.)

There is nothing in this record indicating the judge presiding over appellant's jurisdictional hearing was biased or prejudiced by any of the information found in the

DEJ report. The judge did not allude to any information in the DEJ report during her determination of the evidence in the contested jurisdictional hearing. Instead, she articulated detailed reasons for her decision based upon the evidence presented during the contested hearing. The judge stated, "[T]he officer made it very clear that the gun was closer within reach of the minor and not within reach of the person . . . seated in back of him, and that's why ultimately in addition to the fact that he had a bullet that was consistent with the bullet in the magazine, I obviously did sustain Count 1 because I do believe the minor was in possession of a firearm . . . ."

Moreover, the fact that the judge excluded gang-related evidence during the jurisdictional hearing and ultimately found two other counts alleged against appellant had not been proven beyond a reasonable doubt casts additional doubt on appellant's claim the court was biased or prejudiced against him because of the information contained in the DEJ report. For the foregoing reasons, this is not a case where the facts are so extreme that "even if actual bias is not demonstrated, the probability of bias on the part of a judge is so great as to become 'constitutionally intolerable.' [Citation.]" (*People v. Freeman* (2010) 47 Cal.4th 993, 1001.)

D. Review of Probation Conditions

Appellant claims that "[p]robation conditions prohibiting appellant from possessing any weapons and participating in gang-related activities and associations must be stricken or modified because they are unconstitutionally vague and overbroad."

" 'A probation condition is subject to the "void for vagueness" doctrine . . . .' [Citation.]" (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1070.) " 'The underlying concern' " of the void for vagueness doctrine " 'is the core due process requirement of adequate *notice:* [¶] " 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' [Citations.]" ' [Citations.]" (*Ibid.*, original italics; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) In sum, "A probation condition 'must be sufficiently precise for the probationer to know what is required of

him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*Ibid*.)

As for overbreadth, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

In *Sheena K.*, the California Supreme Court held that a minor does not forfeit a claim that a term of his or her probation is unconstitutionally vague or overbroad even though counsel failed to object in the juvenile court. (40 Cal.4th at p. 879.) Thus, a challenge to a "facial constitutional defect in the relevant probation condition" that is capable of correction without reference to the particular sentencing record developed in the trial court can be heard by an appellate court. (*Id.* at p. 887.)

Here, the court imposed a condition that appellant shall not "use or possess any weapons." Appellant claims "[t]his condition is vague since it fails to adequately identify the objects that may be encompassed within the prohibition. It is inherently uncertain, subjective, and unworkable because it requires appellant to anticipate whether the object he possesses might be considered by someone else to be a weapon. It also fails to provide specific standards for law enforcement or the court to determine whether a violation has occurred."

Respondent concedes the constitutional infirmities in this probation condition and has no objection to modifying this condition in the language suggested by appellant. Thus, we modify the condition to read: "The minor is prohibited from the knowing possession of any dangerous or deadly weapons, or any instrument capable of causing great bodily injury or death with the intent that they be used as such."

Appellant next contends that the probation condition as contained in the minute order indicating "[n]o gang associations, *colors*, clothing, insignias, signs, *paraphernalia* or activities" must be modified to conform to the court's oral pronouncement, which contained additional qualifying language and did not include the italicized language. (Italics added.) Appellant relies on the general rule "[w]here there is a discrepancy

between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]" (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

Respondent concedes that this probation condition should be modified to strike two words—"colors" and "paraphernalia"—so that it conforms to the court's oral pronouncement. Accordingly, this condition is modified to reflect what was stated on the record during the dispositional hearing: "The minor shall not knowingly possess, display or wear any insignia, clothing, logos, emblems, badges or buttons or display any gang signs or gestures that he knows to be or that the [d]eputy probation officer informs him to be gang related."

So modified, the condition requires that appellant know, or that he is informed by his probation officer that he is possessing prohibited symbols of gang affiliation. Consequently, appellant's concern about unwitting possession of items evidencing gang involvement is unwarranted. (See *People v. Leon* (2010) 181 Cal.App.4th 943, 951 (*Leon*) [the delegation of authority to the probation officer to specify gang indicia, coupled with the knowledge requirement, provides adequate notice to appellant regarding which items of gang paraphernalia or gestures are prohibited]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 629 [adding knowledge requirement to condition prohibiting display of gang indicia].)

The court imposed an additional gang-related probation condition: "The minor shall not participate in any gang activity and shall not visit or remain in any specific location known to him to be or that the [d]eputy probation officer informs him to be an area of gang-related activity."

Appellant argues the prohibitions relating to "gang activity" and "gang-related activity" are vague and overbroad and lack an express knowledge requirement and impinge on his constitutional rights. To address appellant's concerns, respondent proposes to modify this condition as follows: "The minor shall not *knowingly* participate in any activity that [he] know[s] to involve a criminal street gang and shall not visit or

remain in any specific location known to him to be or that the deputy probation officer informs him to be an area of gang-related activity." (Italics added.)

While appellant "appreciates the concession," he claims respondent's proposed modification does not go far enough. Appellant argues gang "activity" is a vague term, asserting that it is not clear whether he is prohibited from only gang-related criminal activities or from legal activities, such as attending a musical concert, in which gang members may choose to participate.

"A probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' [Citation.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 382.) During the dispositional hearing, the court defined "gang" and "gang-related" for purposes of the probation conditions to mean criminal street gang as defined in Penal Code section 186.22, subdivision (f). With that definition in mind, the term "gang activity" may be reasonably understood in context to encompass any activity conducted for the benefit of, at the direction of, or in association with a *criminal* street gang, "whose members individually or collectively engage in or have engaged in a pattern of *criminal gang activity*." (Pen. Code, § 186.22, subd. (f), italics added; see also Pen. Code, § 186.22, subd. (b)(1) [focusing on acts done "for the benefit of, at the direction of, or in association with any criminal street gang"].) The focus of the statute supplying the definition of "gang" is on an organization involved in *criminal* activity. (See § 186.22, subd. (e) [listing crimes that may constitute a "pattern of criminal gang activity"].) When considered in context, it is apparent that "gang activity" refers to activities that facilitate or otherwise involve the commission of crimes. Consequently, the term is not reasonably susceptible to an interpretation that includes attending a musical concert or other lawful activities that merely happen to have other gang members in attendance. We also note that courts have held that similarly worded conditions, as modified to include a knowledge requirement, pass constitutional muster. (See, e.g., *In re Victor L.* (2010) 182 Cal.App.4th 902, 913-919; *Leon, supra*, 181 Cal.App.4th at p. 952; *In re Vincent G.* (2008) 162 Cal.App.4th 238, 246.)

E. Failure to Calculate Maximum Term of Confinement and Custody Credits

Appellant next claims the court erred by failing to specify appellant's maximum term of confinement and by failing to calculate his predisposition custody credits. Though appellant did not raise the issue to the juvenile court, the calculation of custody credits may be raised for the first time on appeal. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.)

"When a juvenile court sustains criminal violations resulting in an order of wardship ([§ 602]), and removes a youth from the physical custody of his parent or custodian, it must specify the maximum confinement term, i.e., the maximum term of imprisonment an adult would receive for the same offense. [Citation.]" (*In re David H.* (2003) 106 Cal.App.4th 1131, 1133; Cal. Rules of Court, rule 5.795(b).) Furthermore, "a minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. [Citations.]" (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.) The juvenile court may not delegate the duty to calculate a ward's predisposition custody credit. (*Ibid.*)

Here, the probation report reflects an "aggregate custody time" of three years and that he was detained in Contra Costa County Juvenile Hall from October 7, 2012, until his dispositional hearing on November 28, 2012. Nevertheless, nowhere in the court's statements at the dispositional hearing or in its minute order did the court specify the maximum term of confinement or the amount of predisposition custody credit. (See Cal. Rules of Court, rule 5.795(b) [court "must specify and note in the minutes the maximum period of confinement under section 726"].) Accordingly, the dispositional order must be amended to reflect that the maximum term of confinement is three years and that appellant is entitled to predisposition custody credit. Additionally appellant is entitled to additional credit for any time in custody between the dispositional hearing date and his transfer to OAYRF.[4]

[4] The date of appellant's transfer does not appear of record, thus the total number of days to which appellant is entitled cannot be determined on appeal.

IV.

DISPOSITION

The jurisdictional and dispositional orders are affirmed. However, the gang-related conditions of probation shall be modified as follows: (1) The minor is prohibited from the knowing possession of any dangerous or deadly weapons, or any instrument capable of causing great bodily injury or death with the intent that they be used as such. (2) The minor shall not knowingly participate in any activity that the minor knows to involve a criminal street gang and shall not visit or remain in any specific location known to him to be or that the deputy probation officer informs him to be an area of gang-related activity. (3) The minor shall not knowingly possess, display or wear any insignia, clothing, logos, emblems, badges or buttons or display any gang signs or gestures that he knows to be or that the deputy probation officer informs him to be gang related.

Furthermore, the matter is remanded to the juvenile court with directions to amend the dispositional order to reflect the maximum term of confinement is three years, and to calculate the correct amount of custody credit, including any time appellant was in custody between the dispositional hearing and his transfer to OAYRF.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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HUMES, J.